U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 06 December 2006

In the Matters of:

eBUSINESS APPLICATIONS SOLUTIONS, INC.,
Employer,

on behalf of

RAVI BABU ALLURI,	BALCA No. 2005-INA-00087 ETA No. P2003-DE-03398678
MOHAMED SADIQ ALI BASHEER,	BALCA No. 2005-INA-00089 ETA No. P2003-DE-03400129
HARVINDER KUMAR,	BALCA No. 2005-INA-00090 ETA No. P2003-DE-03393692
VANDANA KIRON RAO,	BALCA No. 2005-INA-00091 ETA No. P2003-DE-03393399
RAMAKRISHNA BALIJA,	BALCA No. 2005-INA-00092 ETA No. P2003-DE-03401134
MUNISH MITTAR,	BALCA No. 2005-INA-00093 ETA No. P2003-DE-03395480
ARVIND KUMAR SRIVASTAVA,	BALCA No. 2005-INA-00101 ETA No. P2004-DE-03408813
POOJA MANGLA,	BALCA No. 2005-INA-00102 ETA No. P2004-DE-03401811
VINEET SOOD,	BALCA No. 2005-INA-00103 ETA No. P2003-DE-03393706
AJAY MAHAJAN,	BALCA No. 2005-INA-00104 ETA No. P2004-DE-03406929

Aliens.

Appearance: Rajiv S. Khanna, Esquire
Arlington, Virginia
For the Employer and the Aliens

Certifying Officer: Stephen W. Stefanko
Philadelphia, Pennsylvania

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

These appeals arise from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification applications for the position of Software Engineer in the above-captioned cases.[1] Because of the similarity of the facts and issued raised, these cases have been consolidated for decision. *See* 29 C.F.R. § 18.11.[2]

STATEMENT OF THE CASE

In late 2002 and early 2003, the Employer, eBusiness Application Solutions, Inc., filed a number of applications for labor certification to enable the alien workers to fill the position of "Software Engineer."[3] Although the Employer apparently filed at least 17 applications, only 10

[1] Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

[2] In this decision, "AF" refers to Appeal File.

[3] 2005-INA-87 at AF 194; 2005-INA-89 at AF 197; 2005-INA-90 at AF 197; 2005-INA-91 at AF 219; 2005-INA-92 at AF 323; 2005-INA-93 at AF 282; 2005-INA-101 at AF 203; 2005-INA-102 at AF 249; 2005-INA-103 at AF 198; 2005-INA-104 at AF 202.

are pending on appeal here. In each application the Employer listed the business address at which the incumbent would work as Wilmington, Delaware, or in "various unanticipated locations throughout the United States."[4] In each of the applications, the Employer requested Reduction in Recruitment ("RIR") processing.[5]

The CO issued Notices of Findings ("NOF") proposing to deny certification for each of the ten applications based on violations of 20 C.F.R. §§ 656.20(c)(8) and 656.21(b)(6).[6] The CO advised the Employer that it was concerned with the legitimacy of the position at the time of filing in Delaware, whether the appropriate labor market was tested for U.S. workers, and whether the ETA 750 was filed with the appropriate State Workforce Agency ("SWA") having jurisdiction over the Employer's headquarters or main office as provided for in ETA Field Memorandum No. 48-94 (May 16, 1994). The Aliens were all currently employed as H-1B workers. The CO noted that the Employer's legal address was listed as being in New Jersey on the relevant Labor Condition Applications (9035E). The NOFs were detailed and provided specific instructions on what the Employer's rebuttal was to address.

The Employer submitted almost identical rebuttal in each of the applications.[7] The Employer contended that it needed a Delaware office, and provided copies of contracts since October 2002 purportedly supporting the existence of technical positions in the Delaware region. The Employer asserted that it chose to file its applications in Delaware because several of its employees were already performing services at client sites in the Delaware region, the cost of living was cheaper there, and the processing of green cards was faster there than anywhere in the

[4] *Id*.

[5] 2005-INA-87 at AF 199; 2005-INA-89 at AF 203; 2005-INA-90 at AF 203; 2005-INA-91 at AF 223; 2005-INA-92 at AF 327; 2005-INA-93 at AF 286; 2005-INA-101 at AF 208; 2005-INA-102 at AF 254; 2005-INA-103 at AF 207; 2005-INA-104 at AF 207.

[6] 2005-INA-87 at AF 188-191; 2005-INA-89 at AF 191-194; 2005-INA-90 at AF 191-194; 2005-INA-91 at AF 212-215; 2005-INA-92 at AF 317-320; 2005-INA-93 at AF 276-279; 2005-INA-101 at AF 197-200; 2005-INA-102 at AF 243-246; 2005-INA-103 at AF 192-195; 2005-INA-104 at AF 196-199.

[7] 2005-INA-87 at AF 110-187; 2005-INA-89 at AF 94-190; 2005-INA-90 at AF 94-190; 2005-INA-91 at AF 93-211; 2005-INA-92 at AF 93-316; 2005-INA-93 at AF 94-275; 2005-INA-101 at AF 96-196; 2005-INA-102 at AF 96-242; 2005-INA-103 at AF 199-191; 2005-INA-104 at AF 96-195.

United States. The Employer included with rebuttal what it titled "The client list which serves in and around the DE region" and "The business plan that shows the growth of business."

The Employer contended that its office in Delaware was established as a result of its continued growth, and was never established as a virtual office for the sole purpose of obtaining alien labor certifications. The Employer explained that all of its employees worked offsite and, therefore, there was no need for office space. In response to the issue of the Field Memorandum, the Employer argued that the memo used the word "should" in indicating where labor certification was to be filed, a word which implied permission, not mandate. According to the Employer, the memorandum was advisory in nature and the Department of Labor had to accommodate cases when an employer intends to place an employee at a job site in the future.

The Employer explained further that it did not file its applications in New Jersey because it had been filing applications in California and Delaware during the last two years. In response to a question in the NOF about the manager to whom the employee would report, the Employer advised that the individual was the HR manager working out of its California office. Also in response to a question from the NOF, the Employer stated it did not have any support staff at its office in Delaware. As directed in the NOF, the Employer submitted the Aliens' ETA 9035Es and I-129s. The Employer also asserted that it had consistently conducted recruitment efforts and had not been able to get U.S. workers who are able, willing, or qualified. As proof thereof, the Employer noted that advertisements were placed in the largest circulated newspaper in the Delaware region, as well as a Delaware Internet site and on the Employer's Web site.

The CO issued Final Determinations denying labor certification in all 10 of the applications now before us on appeal.[8] The CO found that the contracts submitted by the Employer showed locations for itself and its clients which were not in Delaware, and thus substantiated that the Employer was not headquartered in Delaware. With regard to the client

[8] 2005-INA-87 at AF 106-109; 2005-INA-89 at AF 90-93; 2005-INA-90 at AF 90-93; 2005-INA-91 at AF 89-92; 2005-INA-92 at AF 89-92; 2005-INA-93 at AF 90-93; 2005-INA-101 at AF 92-95; 2005-INA-102 at AF 92-95; 2005-INA-103 at AF 95-98; 2005-INA-104 at AF 92-95.

list, the CO pointed out that, of the fifty companies listed as clients, not one was located in Delaware, while thirty-six were located in New Jersey. The CO found that the Employer's business plan did not demonstrate that the Employer had headquarters in Delaware or that Wilmington, Delaware was the intended work location. The 9035Es and I-129s submitted in rebuttal also listed the Employer's place of business as New Jersey. The CO observed that photographs of the office provided in rebuttal provided no indication that the office was actually inhabited by workers. The CO concluded that the Employer had failed to document that the position as described in its application actually existed in Delaware.

The CO also determined that a test of the labor market in Delaware was not an accurate test of the U.S. labor market. The CO observed that the Employer had no Human Resources or payroll office at the Delaware location, and that no employees reported to or were managed out of that office. The CO concluded that the evidence failed to demonstrate valid job openings in Delaware, and therefore the advertising of that job opportunity locally in Delaware was not a real test of the labor market. The CO found that the Employer had not conducted a *bona fide* recruitment effort for U.S. workers given that it had recruited locally in Delaware when it was apparent that an office did not exist in that state. The CO found that advertising should have occurred in New Jersey or California.

In its requests for BALCA review, the Employer contends that it sufficiently identified its location of employment in Wilmington, Delaware, as the place where the Aliens would primarily be reporting, and that there was no requirement under the law that the place of intended employment conform to other criteria. According to the Employer, the phrase "place of intended employment" clearly establishes that the job under certification is a future job; therefore, it is "axiomatic that a labor certification has to be filed from the 'intended place of employment,' not necessarily where the alien is currently employed or even where the corporate headquarters are located." The Employer argues that the photographs submitted in rebuttal unequivocally identified the Wilmington office location of the Employer.

The Employer contends that there are no legal guidelines as to what constitutes an acceptable "office," and argues that the Delaware location is a *bona fide* location. The Employer

argues that the CO failed to note that in a service-based economy, jobs are not crystallized in time and place, and that today's high technology environment renders physical offices less relevant than in the past. The Employer argues that its applications comply with 20 C.F.R. § 656.20(c), and that 20 C.F.R. § 656.3 defines only an employer and a job opportunity, not an office. The denials of labor certification, according to the Employer, create new requirements and reverse long-standing practices without rule-making.

The Employer points to its business plan as evidence of the growth of business in and around the Delaware region, and its contracts as evidence of the future growth of business activity in and around the Delaware region. The Employer further contends that the Department of Labor ("DOL") policy regarding satellite offices has never been clear and that DOL has permitted labor certification filings through satellite offices. According to the Employer, because labor certification applications can be filed where an alien is currently working, corporate headquarters, and where the alien is expected to work upon approval of the green card, the instant application is in accord with DOL policy.

The Employer contends further that it submitted sufficient evidence to demonstrate that job opportunities exist in Delaware by placing advertisements in the largest circulated newspaper and on the Internet site of both the Employer and the newspaper. The Employer asserts that it advertised the position profusely and therefore, it cannot be said that the U.S. labor market was not tested. The Employer argued that "[t]he recruitment would have been deemed defective only if job opportunities were to be found national in scope."

DISCUSSION

1. The Wilmington office was set up to support the filing of labor certifications in Delaware

Upon review of the Appeal File, we find that the great preponderance of the evidence supports the CO's conclusion that the Employer set up the Delaware office for no business

purpose other than to support the filing of labor certification applications in that state. Specifically:

1) The Employer's documentation of its service contracts does not evidence any pattern of work in the Wilmington, Delaware area.

2) The Employer's business plan contains a passing reference to having had a contract with a client in Delaware, but otherwise contains no indication of any current work in that state, or a concrete plan to specifically target clients in the Delaware area to such a degree that a new office would be needed in Wilmington.

3) Although the Employer asserted in rebuttal that the Delaware office was established as a result of its continued growth and was never established as a virtual office for the sole purpose of obtaining alien labor certifications, in other portions of its rebuttal its asserted that it chose to file its applications in Delaware because the processing of green cards was faster there than anywhere in the United States

4) The Employer asserted in rebuttal that because all of its employees worked offsite there was no need for office space. This assertion begs the question of why it was necessary to set up office space in Delaware other than to support the filing of a labor certification in that state.

5) Although the Employer asserted in rebuttal that it chose to file its applications in Delaware because several of its employees were already performing services at client sites in the Delaware region, and the cost of living was cheaper there, these assertions are undermined by the fact that the documentation it submitted did not, in fact, show any significant work in the Wilmington area. We also take notice that the Aliens were all employed by the Employer at the time of the applications under H-1B visas. None of the Aliens lived in the Wilmington area. Rather, several of the Aliens lived in New Jersey (the closest residing in Edison, New Jersey, which is about 100 miles from

Wilmington, Delaware), several in California, one in Texas and one in Florida.[9] They all indicated their intent to reside at the non-Delaware address in Section 7 of the ETA 705B.[10] Thus, the Employer's assertion that it set up the Wilmington in part for the convenience of its workers is belied by the evidence of record in the Appeal Files.

6) The manager to whom the workers would report was located in California. There is no assertion or evidence that any management personnel would be located in Wilmington.[11]

7) No support staff were stationed in Wilmington.

8) The Employer suggested that 17 to 20 workers would report to the Wilmington office. The CO raised the concern that the Employer's lease agreement was only for 492 square, feet, and that this amount of space would not appear to be adequate for that many workers. The Employer's response was that it would be sending its workers to remote work sites and that it had an arrangement with the leasing agent to expand the space if necessary. This circumstance again begs the question, however, as to why the Employer needed to set up a Wilmington office other than to support the filing of labor certification applications in Delaware?[12]

Cumulatively, these circumstances strongly support the CO's finding that the Employer had no valid business reason for setting up the Wilmington office other than to try to make it easier to

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[9] 2005-INA-87 at AF 196 (California); 2005-INA-89 at AF 199 (California); 2005-INA-90 at AF 199 (Florida); 2005-INA-91 at AF 221 (Edison, New Jersey); 2005-INA-92 at AF 325 (Edison, New Jersey); 2005-INA-93 at AF 284 (California); 2005-INA-101 at AF 205 (Texas); 2005-INA-102 at AF 251 (California); 2005-INA-103 at AF200 (Randolf, New Jersey); 2005-INA-104 at AF 204 (California).

[10] *Id.*

[11] The Employer's rebuttal letters contain a diagram showing that the Aliens would also be reporting to a Project Manager. The rebuttal, however, does not explain the Project Manager's relationship to the Wilmington office or allege that the Project Manager would be stationed there.

[12] The Employer apparently also provided photographs of the work space, which the CO found in the Final Determinations provided no evidence that it was actually inhabited by workers. These photographs, however, are not found in any of the Appeal Files, and consequently we do not draw any conclusions about what the photographs may or may not have shown. The Employer's answer to the square foot issue that "all our employees work offsite," however, is essentially an admission that the rental space is not actually used.

obtain "green cards" for the Aliens based on faster processing of applications in that state at the time, and the characteristics of the labor market in Wilmington which made it less likely that a recruitment would produce qualified and available U.S. applicants. Upon review of the record, we find virtually no credible evidence suggesting that the Employer had any reason at all to file the labor certification applications in Delaware other than for the reasons suspected by the CO.

2. Denial of the RIRs was not an abuse of discretion

Although the NOF and Final Determination do not address the cases in terms of review of RIR requests, these cases were before the CO in the posture of requests for approval of a reduction in recruitment. Although the CO went on to deny the applications outright, in effect he also denied the RIR requests. Twenty C.F.R. § 656.21(i) provides that a CO may reduce or eliminate an employer's recruitment efforts if the employer successfully demonstrates that it adequately tested the labor market with no success at least at the prevailing wage and working conditions prior to filing the labor certification application. A CO's decision whether or not to grant a RIR is gauged under an abuse of discretion standard. *Solectron Corp.*, 2003-INA-144 (Aug. 12, 2004).

Although much of the argument in the Employer's rebuttal and request for BALCA review revolves around whether the regulations bar it from filing an application in a location of its choosing, we do not need to engage in a belabored analysis of the issue of whether a reduction in recruitment should have been granted because it is clear that the Delaware market for computer professionals would not have been a valid test of the U.S. labor market for the jobs offered by the Employer. Plainly, the Employer had not been engaged by clients in the Wilmington area, and there is no credible evidence in the Appeal File of a concrete business plan to expand business significantly in that area in the future. We concur with the CO that the Employer appears to have chosen that market for the very reason that it would be unlikely to find qualified and available U.S. workers. Thus, the CO was well within the scope of his discretion in declining to accept the Employer's pre-application recruitment under the RIR regulation.

In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR, such a denial should result in the remand of the application to the local job service for "regular" or "supervised" processing. However, this panel has also held that when an employer's application is so fundamentally flawed that a remand would be pointless – such as where the Employer is unable to establish that it is presenting a *bona fide* job opportunity – the CO may deny the application outright rather than remanding for further processing. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004). Thus, it is necessary to consider whether the CO's finding that the applications were not for *bona fide* positions in Delaware was correct, and if so, whether such a circumstance rendered the applications so fundamentally flawed that a remand for supervised recruitment would be pointless.

3. The Employer's applications did not present bona fide positions located in Delaware

It is not inherently improper for a business to set up an office in a location mainly because it is more advantageous under a government program. The Department of Labor, in implementing the permanent labor certification program, however, must consider whether such an action conflicts with the purpose of Congress in requiring applicants to obtain labor certification by the Department of Labor, *viz* to protect the domestic labor force from an influx of foreign labor while allowing employers to fill labor voids with immigrants. In implementing this purpose, the Department of Labor requires an employer to prove through a test of the labor market that that there are not sufficient workers in the United States who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and that employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

Section 656.3 defines the area of intended employment as "the area within normal commuting distance of the place (address) of intended employment. If the place of intended employment is within a Metropolitan Statistical Area (MSA), any place within the MSA is

deemed to be within normal commuting distance of the place of intended employment." The regulations, however, are not explicit in addressing the issue of unanticipated work sites. ETA Field Memorandum 48-94, provides as follows in section 10, titled "*Labor Certification Applications Where Aliens Will be Working At Various Unanticipated Sites*:"

> Applications involving job opportunities which require the Alien beneficiary to work in various locations throughout the U.S. that cannot be anticipated should be filed with the local Employment Service office having jurisdiction over the area in which the employer's main or headquarters office is located.

In the instant applications, the Employer attempted to avoid this guidance by the fiction of creating a "virtual office" to which workers would be nominally assigned, even though neither their homes nor their works sites would necessarily be close to that office.

The Employer correctly observes that ETA Field Memorandum 48-94 uses the term "should" rather than "must" in describing the location at which an application should be filed. The Employer's argument that the memorandum is invalid based on 5 U.S.C. §552(a)(1) because it constitutes a substantive change in policy and has not been published in the Federal Register, however, is off the mark. Clearly, the Field Memorandum is not a regulation with the force of law. In *HealthAmerica*, 2006-PER-1 (July 18, 2006) (en banc), the Board recognized U.S. Supreme Court authority to the effect that agency interpretations, such as those in opinion letters, policy statements, agency manuals, and enforcement guidelines, lack the force of law and do not warrant the deference afforded by the courts to an agency's construction and interpretation of federal statutes and implementing regulations. However, the Board in *HealthAmerica* did not go so far as to find that such agency interpretations are automatically invalid. Rather, the Board recognized that an agency interpretation may provide persuasive authority, depending on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.

We find that ETA Field Memorandum 48-94 is a reasonable interpretation of existing regulations, not a substantive change in law or policy. Existing regulations require the Employer to test the market and conduct a good faith recruitment effort in the place of intended

employment in order to ensure that qualified, willing and able U.S. workers are not adversely affected in the location where the Alien is to be employed. The Memorandum fills a gap in the statute and implementing regulations by recommending the proper location for filing of the application in circumstances where the location for the proposed employment of the Alien is uncertain. The Memorandum constitutes a reasonable construction of the regulations given the underlying purpose of the statute.

Thus, although the Employer cites the use of the word "should" in the Memorandum and emphasizes the non-mandatory aspect of the specific guideline in the Memorandum regarding unanticipated worksites, nothing in the regulatory scheme obliges a CO to process an application at a location where an employer happens to choose to file, especially where it appears that the employer chose that location to avoid recruiting in a more relevant labor market. In other words, an employer's choice to ignore the guidance provided by the CO for the appropriate location for filing an application because such guidance is not "law," does not clothe the application with any more or less validity for processing in the location chosen by the employer.[13]

At issue in these appeals is not so much whether the location of filing of the applications was permissible, but whether the Employer is testing the labor market in a place appropriate for the position offered. As we found above, it is clear that the Employer chose to rent space in Wilmington, Delaware and to nominally assign workers to that space in order to attempt to control where the labor market would be tested and to obtain faster processing. We are not so concerned about the latter motive. The first motive, however, is problematic when it is clear that the workers would not live or work near the rented office space. The test of the labor market in

[13] The Employer also contends that the "place of intended employment" establishes that the job under certification is a future job based on 20 C.F.R. §656.20(c)(4). Therefore, the Employer argues, requiring the Employer to file where the Alien is currently employed or even where the headquarters is located is unnecessary. Section 656.20(c)(4), however, is meant to ensure that an actual job will exist and the Alien will be employed at the time of entrance into the United States. That regulation makes no distinction between existing and future positions. Moreover, it cannot be presumed that a relationship exists between the Section 656.20(c)(4) and an Employer's obligations regarding the place for filing of applications. Rather, the applicable regulation is at 20 C.F.R. § 656.21(a), which required, under the pre-PERM procedure, filing "with the [SWA] serving the area where the alien proposes to be employed." In any case, the basis for purported employment of the Aliens in Delaware is untenable regardless of how section 656.20(c)(4) is interpreted.

such a case may not have any "real" connection to the pool of workers who may be available for the job.

The Appeal Files in these cases strongly suggest that the Employer is offering *bona fide* job opportunities for Software Engineers; however, there is ample evidence to support the CO's conclusion that it is not offering *bona fide* job opportunities for such positions in Wilmington, Delaware. The fact that the "new economy" frequently includes jobs without fixed work sites does not mandate that the Department of Labor accept a fictionalized location for a job offering as the basis for a labor certification application.

In these cases, the Employer consistently insisted that it was offering *bona fide* employment in Delaware. We find that this was a fiction and that there is ample evidence to support the CO's conclusions concerning the validity of the positions, the intended place of employment, and the appropriate location for filing of the application. We find that the applications were so fundamentally flawed by such a fiction about the proposed place of employment that a remand for supervised recruitment is not an available remedy to the Employer. Rather, its remedy is to re-file the applications under the current regulations.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for

review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.